No. 55

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CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1944

PACIFIC GAS & ELECTRIC COMPANY, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Petition for Rehearing

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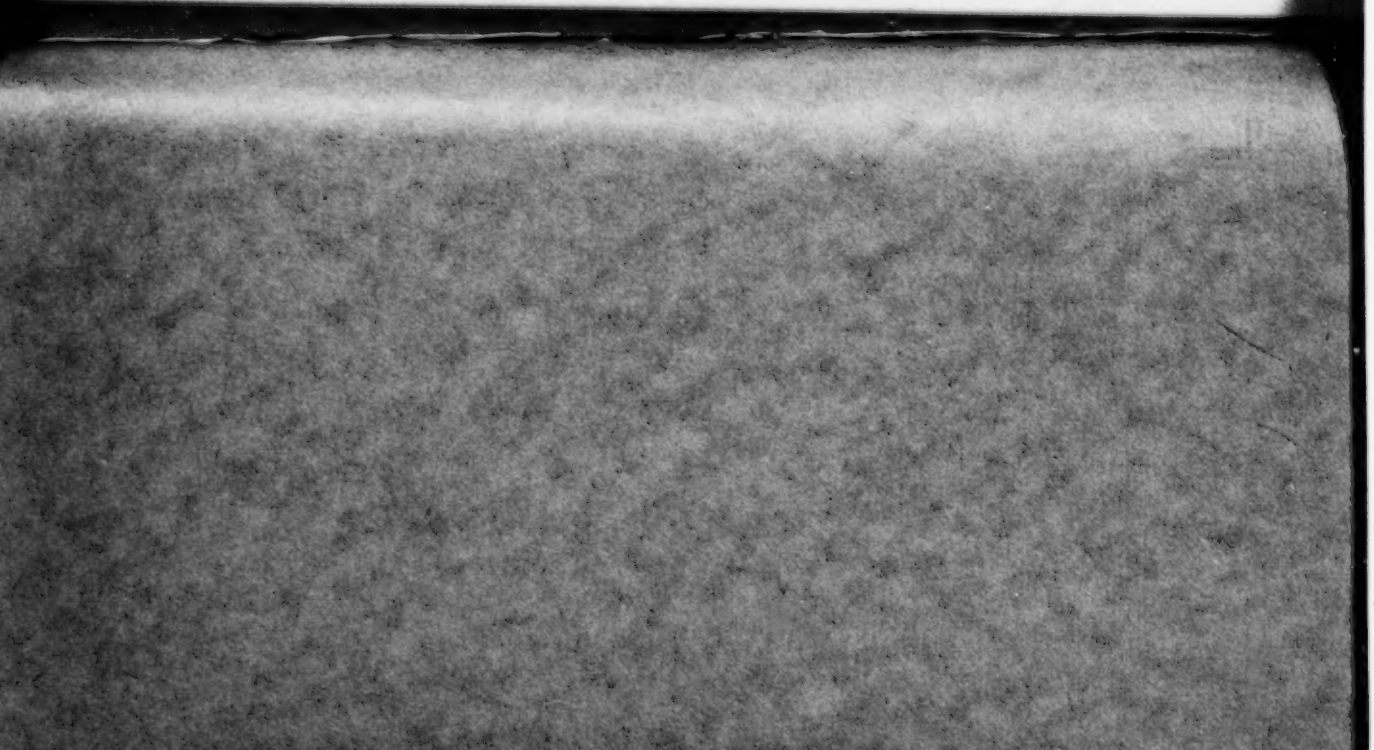

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Petition for Rehearing

To the Chief Justice and Associate Justices of the Supreme Court:

It is respectfully requested that a rehearing be granted of the order of this Court affirming the judgment of the court below by an equal division.

Here the Court has for the first time permitted the decision of an administrative body to stand, simply because no court has been able to decide whether the decision was within or without that body's granted powers. The action of this Court, coupled with the fact that the court of original jurisdiction was also equally divided, has the result, if a rehearing be not

granted, of investing the decision of the Commission with a finality that Congress expressly denied when it provided that orders of the Commission were to be subject to judicial review.[1]

The result is even more striking when it is realized that the Commission did not find that Petitioner was within the area of federal regulation as laid down by the Act, but merely that it had not "demonstrated" that it was without such area.

It is reasonable to believe that but for the provisions for judicial review the Act would not have been passed (79 Cong. Rec., 8390, 8395, 8400). They were put forward with primary emphasis in support of the Act's validity when it came before this Court in the *Electric Bond and Share* case, 303 U.S. 419.

We submit that the judicial review thus provided for has not been accorded. Although in form the judgment is an affirmance, it is in substance, as was the judgment of the court below, an announcement that the Court cannot act, and that the request for judicial review of the Commission's order is therefore dismissed. *Durant v. Essex,* 7 Wall. 107, 112.

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[1]The United States Law Week in its issue of March 13, 1945, commented on this Court's order as follows:

"A review of federal administrative law does not indicate any other instance in which an order of a federal administrative agency was upheld by action similar to that had in this case."

A Rehearing Will Permit a Decision on the Merits, or Other Disposition in the Public Interest.

Because the judicial review intended by the Act has not been given, because the effect of the court's action in affirming the Commission's order will make it *res judicata* against Petitioner and because of the public importance of the questions presented, it is submitted that this Court should make every effort to see that the cause is disposed of on the merits.

The indispensable step toward this result is the granting of a rehearing. If this is done the following results, all in the interest of justice, are possible: (1) On reargument, the Court may find itself able to agree; (2) If unable to agree, written opinions stating the area of agreement, will be valuable as a guide to all those affected by the Act and especially in connection with further proceedings by Petitioner before the Commission; (3) The cause can be remanded to the Commission for further proceedings in the light of the changed circumstances since the record was made; (4) The cause can be remanded to the court below for further consideration, thus insuring a decision on the merits, since the vacancy on that count which led to the equal division has now been filled.

The Proceeding in the Court Below Was an Original Proceeding and Not Appellate.

The judicial review provided by the Act encompasses questions of "constitutional power, statutory authority and the basic prerequisites of proof".[1] In-

[1] *Rochester Telephone Corp. v. U. S.*, 307 U.S. 125, 140.

deed if the statute failed to provide a method for judicial review on such questions, they would be open to examination under the general equity powers of the district courts,[1] since an administrative body cannot constitutionally be invested with final authority to determine these strictly judicial questions. Where, as in the case of this Act, the review is by a proceeding in the Circuit Court of Appeals, such proceeding is original and not appellate. It is not part of the general jurisdiction of the courts of appeals.[2]

The proceeding in the court below under Section 24(a) of the Act was, therefore, an original judicial proceeding, being the first judicial hearing of the case. See *Commission v. Havemeyer,* 296 U.S. 506, 511, 519; *Chamber of Commerce v. Federal Trade Commission* (C.C.A. 8th), 13 F.2d 673, 674.

In *Natural Gas Pipeline Co. v. Federal Power Commission* (C.C.A. 7th), 128 F.2d 481, 484, the Court said:

> "We think it well settled that in respect to review of orders of Federal Boards and Commissions, the jurisdiction of the Circuit Court of Appeals when granted by Congress, is original rather than appellate in character and that, being endowed with original jurisdiction, the court may by its own orders protect the rights of the parties in any manner in which any trial court

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[1] *Stark v. Wickard,* 321 U.S. 288, 306; *Steele v. Louisville & N. R.R. Co.,* ..... U.S. ....., 89 L.Ed. (Adv. Ops.) 172, 180.

[2] *American Federation of Labor v. N.L.R.B.,* 308 U.S. 401, 404.

of equity of general jurisdiction might do so in an injunction suit."

Section 24(a) imposes a positive duty on the courts; they "have exclusive jurisdiction to affirm, modify or set aside such order in whole or in part". The power of the Commission is lost during the pendency of the proceeding and the court is bound to decide the controversy.

In an original proceeding before a court made up of more than one judge, concurrence in a decision by a majority of the court is essential to any action. If such concurrence cannot be obtained, the matter must remain *in statu quo*. For a court of first instance, equally divided on the merits, to attempt to dispose of the matter one way or the other amounts to a decision of the case by less than a majority of the court. 21 C.J.S. 296; *In re First Congressional District Election*, 295 Pa. 1; *Deglow v. Kruse*, 57 Ohio St. 434; *In re Kings Co. E. R. Co.*, 78 N.Y. 383, 385.

Apart from the constitutional duty of the courts to determine whether an administrative body has acted pursuant to law, specific provision in the statute for judicial review has additional significance. *United States v. Carolina Carriers Corp.*, 315 U.S. 475, 489.

We submit that the performance of the judicial function in such matters requires a judicial determination of the question whether the administrative agency has acted within its powers, and whether a fair hearing has been accorded. This duty, we submit, was not performed by the Circuit Court of Ap-

peals and this Court declaring that their members are equally divided over the question whether the action of the administrative body was proper, and that they are therefore unable to determine the issues presented.

This point was urged in our petition for certiorari and in our brief herein. It was not stressed at the oral argument because it seemed that the point would be academic if this Court should enter an order approving or setting aside the order of the Commission on the merits. In view of the disposition of the case by this Court the point is no longer academic but is a live issue.. We again urge the point on the attention of the Court in order that it may be more fully presented on rehearing.

Reargument May Well Result in a Decision on the Merits.

The questions presented on this review are important not only to the parties directly involved, but also to the public generally; and for that reason it is submitted that they should be decided if that is at all possible. Even though situations may arise in which the courts simply cannot act because of an equal division, such a result is undesirable, and means should be found, if possible, for a judicial determination of the questions presented.

Only three months, with intervening Christmas holidays, elapsed between the submission and the order.[1]

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[1]This case was under submission in the Circuit Court of Appeals from December 18, 1942, to February 23, 1944, before it concluded that it was unable to agree upon a decision. Two of the judges concurred in an opinion which expressed their views on the questions involved.

A reargument directed to the points upon which the Justices differ, followed by further consideration, might well result in agreement on a decision on the merits—at least it would seem but just that this opportunity should be afforded the parties. The probability of agreement on disposition of the case is apparent from the action of the Court on reargument of eight cases as to which the Court was equally divided (313 U.S. 596, 597). At the next term all of these cases were disposed of on the merits.

Rendition of Opinions Will Forestall Future Confusion and Injustice Even Though the Court Remains Equally Divided.

If, after reargument, the Justices are still unable to reach an agreement, it would serve the cause of orderly administration of the Act, and the determination of the rights of the parties affected by it, if the views of the Justices were expressed in opinions. The area of agreement might well cover some or all of the issues involved on the hearing of a new application to the Commission for a declaration that under the facts now existing, Petitioner is not a subsidiary.

Speaking now generally, the value of the opinions of members of this Court to the parties and to others as well, is by no means dependent upon concurrence of a majority. Dissenting opinions are, of course, frequently invaluable. The fact that no more than three judges concurred fully in any one of the five opinions delivered in *Downes v. Bidwell,* 182 U.S. 244, did not prevent that case from being a landmark in the development of constitutional principles, and the im-

portance of the case was little affected by the circumstance that five Justices were able to agree only on a result.

We submit, therefore, that particularly in cases like this, where the basic problem should in any event be considered further by the Commission, the Court should set forth the views of its members on the questions presented.

Silent Affirmance Has Unjust and, We Submit, Unintended Consequences.

As shown, the substance of the Court's decision is to dismiss Petitioner's application for judicial review. But being in form an affirmance, it operates under established principles to give the Court's unqualified approval to every aspect of the Commission's decision.

The judgment of this Court is *res judicata,* whether or not the Commission's order would have been *res judicata* if no review had been sought, and notwithstanding that the judgment is a silent affirmance by an equally divided court. *Durant v. Essex,* 7 Wall. 107, 110; *United States v. Pink,* 315 U.S. 203, 216; *Scott, Collateral Estoppel by Judgment,* 56 Harv. L. Rev. 1, 10.

In the absence of any intimation of the Court's views, the parties and others are left to surmise that none of the criticisms of the Commission's opinion and methods, forcefully stated in the dissenting opinions below, is agreed to by a majority of this Court. On every major point, moreover, the views announced by the Commission, considered *seriatim,* must be taken

as approved by at least four members of the Court, and possibly by a clear majority.

The argument in this case demonstrated that the Commission believed that the mere existence of a 10% stock holding authorized it, without more, to deny a declaration, and thus subject a local company to Federal regulation.

The result will be that local companies, which Congress never intended to subject to Federal regulation, will be held subject to Commission power, and Federal power will be exerted within what would otherwise be the domain of state power, without any showing of justification therefor.

Moreover, the Commission will undoubtedly interpret this Court's action as approving its view that the Act dispenses with the requirement, heretofore insisted upon by this Court, that where a determination of status by an administrative body imposes burdensome obligations, or subjects otherwise local matters to Federal control, the administrative body must determine plainly and explicitly that the facts which the statute makes prerequisite to the determination are present, particularly where, as here, the courts are without power to find the facts independently. *United States v. Carolina Carriers Corp.,* 315 U.S. 475, 489; *Yonkers v. United States,* 320 U.S. 685, 691.

No other statute, so far as we know, has attempted, or been construed as attempting, thus to dispense with any determination that the factual basis prerequisite to an exercise of power is present. There can be no

honest doubt that, as the Congressional debates show without any equivocation, every assurance was given that the intent of the Act was to regulate local public utilities dominated by interstate holding companies, and effectively to exclude from such regulation all local public utilities not so dominated. (Our Brief, pp. 25-34, 40-45.) But the Commission repudiates the idea that it must make any finding or have any opinion on that question one way or the other either as a preliminary fact or as an ultimate conclusion and expressly refused to make any such finding here (R. 1930-1931).

The power of the courts, heretofore undoubted, to insist upon administrative procedure that will enable them to determine whether legislative commands have been obeyed or disregarded, is thus emasculated, and provisions purporting to guard against the exercise of arbitrary power through judicial review of administrative action are made meaningless.

Reconsideration by the Commission May Well Solve the Present Difficulty and Is Appropriate Under the Facts Presented.

Remand of the case to the Commission may well end the difficulty created by inability of the courts to decide on the merits. On the other hand, silent affirmance will, as shown, confuse future consideration of Petitioner's status. Changes that have taken place during the four years since the evidence was closed in January 1941, are such that, quite apart from the Court's present inability to deal with the case on the merits, the case should not be decided on the merits until after the Commission has reconsidered the question in the light of the facts now existing. Reconsider-

ation, therefore, will not only avoid the difficulties raised by the equal division in the Court, but is called for on other grounds as well.

Petitioner filed its application in November, 1935, but it was not until five years later, September, 1940, that the Commission set the application for hearing, although in the interim it heard and disposed of more than a score of similar applications under Section 2(a)(8). The hearing was concluded January 15, 1941. The Commission denied the application on September 10, 1941. The court below affirmed the Commission's order by an even division on February 23, 1944. Certiorari was granted on May 22, 1944, and this Court affirmed by an even division on March 12, 1945.

Many changes have taken place since the record was closed on January 15, 1941, more than four years ago. As disclosed to this Court by the Commission, the following have occurred:

> "Since the Commission's opinion in this case, the Commission has in other proceedings ordered North American to dispose of its holdings of petitioner's stock, and North American has already entered upon a program of disposition which will probably result in bringing its holdings below the statutory 10% within approximately the next year. See note 3, *supra*. Thus, the decision of this case, if favorable to the Commission, will subject the petitioner to the responsibilities and restrictions of a subsidiary for only a relatively short period. However, the validity of the Commission's order is of course to be considered in the light of conditions as they existed when the order was made, at which time there was no basis for fore-

> casting how long petitioner was likely to remain in the status of a subsidiary." (Commission's Brief, p. 26)

At another point the Commission points out that

> "Since the date of the Commission's order, North American has distributed some of petitioner's common stock as dividends. As of October 2, 1944, its holdings had been reduced to 24.99% of the common stock, comprising 13.02% of petitioner's voting securities. North American has committed itself to a program of systematic disposition of its P. G. & E. stock under which it will reduce its holdings below 10% by January, 1946, if dispositions are continued at the present rate. It is also under order to dispose of that stock and it has urged no error in that determination except the general constitutional objection raised in the proceeding now pending on the special calendar of this Court, *North American Co. v. Securities and Exchange Commission,* No. 1, present Term." (Commission's Brief, p. 5)

The records of this Court show that subsequent to the Commission's order in this case, the Commission directed North American to divest itself of its interest in Petitioner (Holding Company Act Release No. 3405)—that order being now before this Court on certiorari in *North American Co. v. Securities and Exchange Commission,* 318 U.S. 750. The case is being held on a special docket because of the absence of a quorum, 320 U.S. 708.

Regardless of the differing views of the members of the Court as to the propriety of the Commission's

original order, the interests of justice demand that the Commission be directed to reconsider the question of whether Petitioner is subject to the controlling influence of North American in the light of the changed circumstances now existing.

The Court Has Adequate Power to Dispose of the Case as Justice May Require.

The Court has repeatedly announced the principle recently stated in *Ashcraft v. Tennessee,* 322 U.S. 143, as follows:

> "In disposing of cases before us it is our responsibility to make such disposition as justice may require. 'And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered.' "

In *Ford Motor Co. v. National Labor Rel. Bd.,* 305 U.S. 364, 373, involving provisions for judicial review similar to those in the Act, the Court said:

> "It is familiar practice to remand causes for further proceedings without deciding the merits. . . .
>
> "The jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity powers, and . . . it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. . . . the court may remand the cause to the Commission for further proceedings to the end that valid and essential findings may be made. . . . Whatever findings or order may subsequently be

made will be subject to challenge if not adequately supported or the Board has failed to act in accordance with the statutory requirements."

This Court goes to great lengths to insure that unjust or improper results shall not arise out of the mechanics of procedure. *Phillips v. United States,* 312 U.S. 246; *Query v. United States,* 316 U.S. 486.

Means Are Readily Available for Obtaining a Decision on the Merits.

A judicial decision of this case on the merits would clearly be in the interests of justice. We therefore point out that even though the Court should be inclined to the view that on rehearing its even division might continue, a decision of the case on the merits can be obtained by any one of several alternative courses after a rehearing is granted.

1. This Court could remand the cause to the Commission (or direct the court below to do so) with direction to take evidence of the changed circumstances which have occurred since the record in the proceeding was made in January 1941, more than four years ago, to make findings based thereon, and to determine on that basis whether Petitioner is now dominated by North American in a manner calling for regulation under the Act.
2. This Court could remand the case to the Circuit Court of Appeals with directions to further consider the cause and render its decision. The vacancy which existed at the date of the earlier hearing and consideration, and which made an even division of the court possible, has now been filled, and the seven judges should be able to arrive at a decision.

Conclusion

The disposition of this case by two equally divided courts is, so far as we can determine, unique in American jurisprudence. It cannot fail to be cited as a precedent for the proposition that judicial determination of questions of constitutional power, statutory authority and the basic prerequisites of proof can be left to the sole determination of an administrative body and that no court need necessarily determine such questions. If such be the law, provisions for judicial review of administrative orders are an idle formality. We cannot believe that this Court intends that the judicial functions created by the Constitution and by statute should be completely abdicated.

We respectfully pray that a rehearing should be granted, and that pending the consideration of this petition, the issuance of the mandate be stayed.

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San Francisco,
March 24, 1945.

CERTIFICATE OF COUNSEL Moore

WE HEREBY CERTIFY that the foregoing Petition for Rehearing is presented in good faith and not for delay.

HERMAN PHLEGER,
WM. B. BOSLEY,
ROBERT H. GERDES.

Dated: San Francisco, March 24, 1945.